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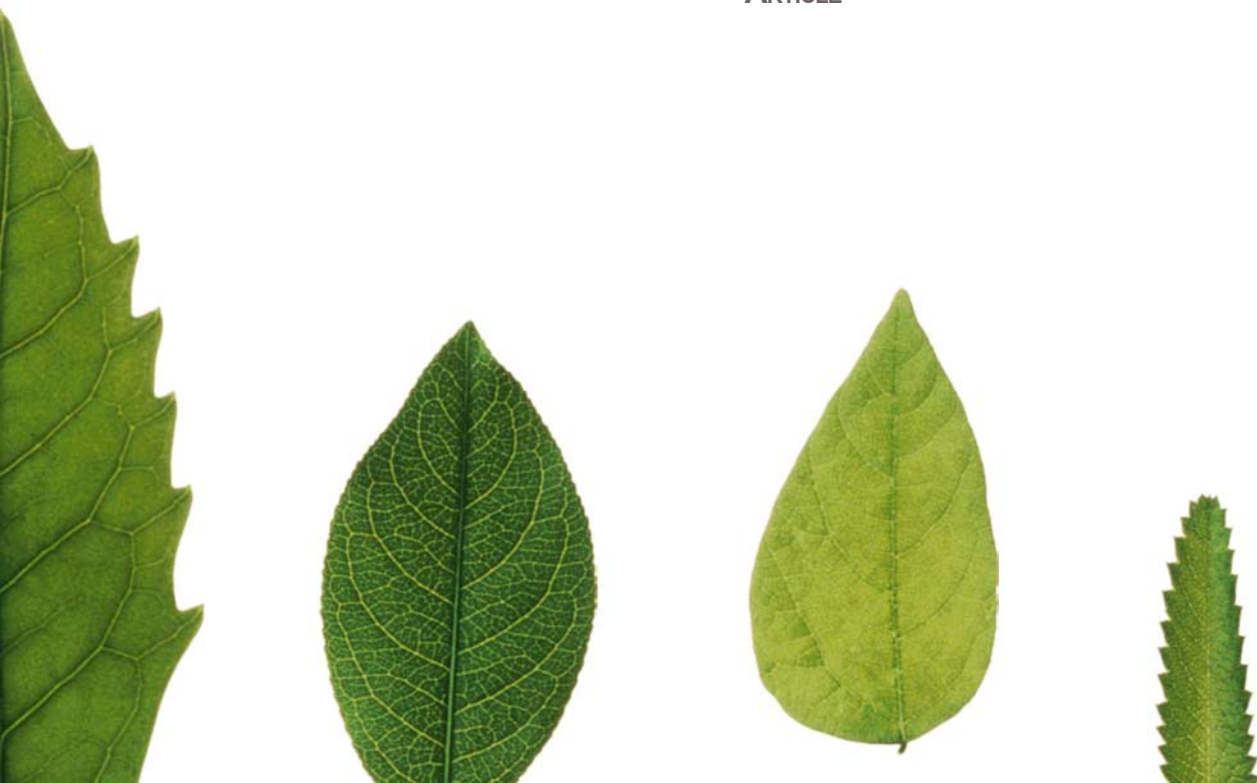
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EVOLUTION OF FOREST LAW AND REGULATION IN ZAMBIA FROM 1973 TO 2015: ANALYSIS OF THE GAP BETWEEN TEXT AND CONTEXT

Makweti Sishekanu

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Makweti Sishekanu, Part time Lecturer of Environmental Law and Governance in the School of Education, The University of Zambia (UNZA), Lusaka, Zambia;
Legal and Regulations Expert, National Safeguards Technical Working Group of the Ministry of Lands and Natural Resources, Lusaka, Zambia;
UN FAO Zambia National Consultant Trainer in Community-based Forest Enterprises, Lusaka, Zambia,
Email: maksishe@gmail.com

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1

INTRODUCTION

The major drivers of forest loss in Zambia are well documented as agricultural expansion, charcoal production, fuelwood collection, wood harvesting, human settlements, fires, urbanization and urban expansion, industrialization and livestock grazing.¹ But these factors are symptoms of the key underlying drivers which are; high levels of poverty, low employment opportunities, brick-making, tobacco curing, insecure forest and land tenure (who owns and controls the land), low institutional capacity of the Forestry Department (FD) as a result of poor funding, low staffing levels, lack of reliable transport for monitoring, and lack of synergy among policies and legislation.² That these trends are still on the rise despite an ostensibly good and progressive legal/regulatory framework,³ justifies the need for an empirical examination of the effectiveness, responsiveness and coherence of Forestry law and regulation in Zambia. As argued that law and regulation perpetuate a historical regulatory culture of the state, examining it can only be sufficient by analyzing the pattern of its evolution.

Therefore, the paper undertakes a critical analysis of the interrelationships among three factors used to assess the efficiency of a regulatory system – effectiveness, responsiveness and coherence. The paper builds on the field of empirical legal inquiry in which the practical aspect of the law is critically assessed in the real world against societal values outside of statutes

and regulatory instruments.⁴ This also explains the volume of non-legal literature reviewed and document analysis undertaken from the materials written by, and consultations with, technical experts in the forestry sector.

The paper starts by examining the letter and spirit of the Forests Act 1973 and the social context which was targeted by the legal text and regulatory machinery. The paper then proceeds to look at the Forests Act of 1999, legislation that was never implemented. But the analysis of this defunct statute will be based on its history and the future it was espoused to influence. At the end, the paper discusses the Forests Act of 2015 and analyzes the current regulatory trilemma which the law brings to the fore mirrored against societal reality. The paper concludes that it is very unlikely that current trends of forest degradation and deforestation in Zambia can be decelerated without attention to the regulatory trilemma in the law; effectiveness, responsiveness and coherence of text to context. In particular, the lack of attention to the regulatory trilemma is itself symptomatic of the blindside of the legacy of Command-and-Control (CAC) regulation - a regulatory culture the state has, firstly, inherited from its colonial past,⁵ and secondly, jealously guarded in protecting and enforcing national values of forestry. But whether this regulatory culture is good or bad is not part of the argument within the scope of this paper. The gist of the paper is to analyze the effects of this regulatory culture on the effectiveness, responsiveness and coherence of the law in relation to the socioeconomic context in which the law is being enforced.

1 Royd Vinya and others, *Preliminary Study on the Drivers of Deforestation and Potential for REDD+ in Zambia: A Consultancy Report Prepared for the Forestry Department and FAO under the National REDD+ Program in the Ministry of Lands and Natural Resources* (FAO 2012) iv.

2 *ibid* iv.

3 That is, the Forests Act No. 4 of 2015 and its related Statutory Instruments.

4 Hazel Genn and others, *Law in the Real World: Improving our Understanding of How Law Works*. Final Report and Recommendations (The Nuffield Foundation 2006) iii.

5 Mwelwa C Musambachime, 'Colonialism and the Environment in Zambia, 1890 -1964' in Samuel N Chipungu (ed), *Guardians in Their Time: Experiences of Zambians under Colonial Rule, 1890-1964* (MacMillan Press 1992) 9-10.

2 THE FORESTS ACT NO 39 OF 1973

Law and policy both reflect the societal values, norms and culture of the law and policy-makers.⁶ This is clear throughout the evolution of forest law and regulation in Zambia from the Forests Act 1973 to the Forests Act 2015. While policy has been used to define and elaborate these values, statutory law, reinforced by secondary statutory instruments, has been used to enforce and protect the values. In the midst of elaborating, enforcing and protecting the country's forestry values, attention to the elements of effectiveness, coherence and responsiveness of the legal/regulatory mechanisms used in enforcing and protecting the same values has been lost.

After independence in 1964, the Government of the First Republic of Zambia did everything within its powers to assert national sovereignty and authority over land and natural resources.⁷ Given that the control of natural resources begins with authority over land, as enacted in sections ten and nineteen of the Forests Act 1973, the Presidential stewardship principle has become the foundation of natural resource management in Zambia.⁸ The principle has always permeated forest management from the Forests Act 1973 to the Forests Acts 2015. If all land is vested in the President, all trees that stand on state land, all produce derived from forest, namely national and local forests, must be vested in the President on behalf of the Republic.⁹ Chungu rightly observes that this took away opportunities for private ownership rights of

trees even where title to land was held.¹⁰ As such, doors for private forest management were de facto closed. From a regulatory ethos, the Presidential stewardship principle lays the foundation for CAC approach to forest regulation.

Through the Forests Act 1973, the state had assumed the unilateral power to command (through legal rules) and the responsibility to control (through administrative procedures of statutory bodies) the entire forestry sector in the country. Regulatory ethos often sees this as a linear progressive approach that proceeds from policy formulation to implementation, rule-making to enforcement, and hence the term Direct Regulation.¹¹ An inevitable part of such control involves land on which the forests stand. As such, the Government of the Republic of Zambia (GRZ) established a sub-category of landholding in government reserve land for the protection of public natural resources like trees in national and local forests, wildlife in national Parks and game management areas.¹² Essentially, forest law after independence in Zambia was not tailored to solve any set of forestry-related problems. It was rather one of the strategic state mechanisms for asserting national sovereignty over natural resources. The motivation to assert national authority and sovereignty over natural resources is discernable in the repeal of the colonial Forests Act Cap 311 of the Laws of Northern Rhodesia (Zambia before independence).

The Forests Act of 1973 was focused on protecting forest catchment areas through the establishment of national and local forests, to conserve and protect forests and trees as sources of timber, and thereby, to regulate timber extraction through licensing as a key regulatory technique.¹³ The foregoing purposes constituted, in Chungu's words, a conservationist and protectionist spirit.¹⁴ But while the basis of being

6 Stuart Bell and others, *Environmental Law* (8th edn, Oxford University Press 2013) 12.

7 Paul Chungu, *Evolution of Environmental Law in Zambia: 'A Paper Presented at the Judges' Seminar on Environmental Law'* Siavonga, December 2005, 3.

8 The President may, by purchase or compulsory acquisition under the Lands Acquisition Act, acquire any land for the purposes of National Forest, if he considers it necessary or desirable in the public interest so to do.

9 The Forests Act 1973, s. 3.

10 Chungu (n 7) 10.

11 Bell and others (n 6) 229.

12 Chungu (n 7) 4.

13 The Forests Act 1973, preamble.

14 Chungu (n 7) 8.

conservationist were somewhat clear, the protectionist's spirit was not clear. What were the forests being protected from? While problems in the forestry sector could have probably been anticipated in the future, the legal regulatory system itself was not designed to prevent foreseeable or unforeseeable problems in the future?

Zambia's problems in the forestry sector began to emerge in the 1980s following the economic depression of the 1970s.¹⁵ It is reported that forest reserves suffered the greatest loss of the time – from an estimated 7.6 million to 7.3 million hectares,¹⁶ attributed to human encroachments and over-exploitation of forest resources.¹⁷ The two problems could explain themselves in that; encroachments are purely community problems while over-exploitation is a government-related problem created by attempts to use forest resources (especially timber) to cushion the effects of a declining economy. This fact could not have been appreciated and documented in the 1970s but it could not be ignored later in the 1990s when forests played a crucial role in the country's economic recovery program.¹⁸

Given the fact that the state demarcated forests as national and local forests,¹⁹ or any other form of forest protection that government would deem necessary to prescribe at the time, the scope of forest protection was, by default, limited to the 'demarcated' forest area defined by the law. Outside of the boundaries of demarcated forests was a 'coupe', defined as 'any site or area for felling or taking of forest produce, whether the boundaries thereof are demarcated on the ground or not'.²⁰ As a general principle, the law does not protect what it has not defined or what has not been captured within its precise boundaries.²¹ Therefore, it

is inferable within the spirit of the Forests Act of 1973 that the coupe were not legally protected areas. No license under Part VII, no permit or any form of regulatory authorization such as timber marking were required for felling, cutting and/or removing forest produce from the coupe under the law. Hence the coupe system became de facto open access areas which began to suffer the tragedy of the commons during the economic recession of the 1970s.²² This should explain the subsequent problem of encroachments in the 'demarcated' forests (protected areas) as communities, driven by their pressing socioeconomic needs, shifted their focus from their depleted forests in the coupe system in to the protected forests.

Given that 88 per cent of the legally 'demarcated forests' under GRZ protection was on traditional land at the time,²³ it also meant that these forests were located in local community areas. This fact is implicit from section sixty seven of the Act albeit local communities were fenced off from the same demarcated or protected forests.²⁴ According to the thinking of section sixty seven, the only role these communities could play in forest management was to respond to forest emergencies such as forest fires.²⁵ This was a legally positive obligation rather than a community discretion to help through participation. Understandably however, the assumptions of the policy and law-makers then could have been informed by a belief that the traditional systems were well-placed and strong enough to deal with regulation of forest resources under the coupe system. But the problem of deforestation and forest degradation later on proved that this assumption was wrong. It also exposed the weaknesses of the classical regulatory orthodoxy of CAC which is based on the deterrence theory that assumes an adversarial and antagonistic relationship between state regulators and those targeted by the regulations.²⁶

15 *ibid* 8-9.

16 *ibid* 9.

17 *ibid* 9.

18 Patrick W Matakala, ILUA II Technical Report Series 2016: ZFAP Preparatory Review (FAO, Ministry for Foreign Affairs of Finland, and the Forestry Department, 2016) 6.

19 The Forests Act 1973, s 2.

20 *ibid* s 2.

21 Sir Robert Jennings, foreword in Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) xxvii.

22 Matakala (n 18) 22.

23 Chungu (n 7) 10.

24 The Forests Act 1973, s 67.

25 *ibid*.

26 Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 129.

The tragedy of the communal commons under the coupe system was also a reflection of the effects of the thinking of the time. Seeing no link between environment and development in the 1970s, most African governments saw environmental problems as issues of developed countries and not challenges of developing countries.²⁷ With a biased focus on industrialization at the expense of environmental protection, Zambia was slowly falling into two self-dug pits; firstly, a development crisis caused by over-borrowing to finance industrial development which also culminated in an economic decline due to a rapid fall in copper prices; and secondly, an environmental crisis which the government did not see or simply chose to ignore.²⁸ While the lack of forest regulation in the coupe system compounded the environmental crisis, the legal/regulatory mechanism in the sector was neither designed to address nor to respond to current, foreseeable and/or unforeseeable problems in the sector.

How effective, therefore, was the Forests Act 1973? Firstly, from the perspective of effectiveness, the law was inept and blunt in the face of problems it was never designed to solve or respond to. As such, the regulatory infrastructure crumbled in the face of unforeseen complex societal realities. Secondly, in terms of coherence, the law was viewed to be inconsistent with the land tenure system.²⁹ While state land is reported to have constituted only 6 per cent of the entire land at the time, 88 per cent of all government legally demarcated forests stood on customary land under traditional rulers.³⁰ This created a conflict of jurisdiction between the FD and traditional rulers.³¹ Consequently, it was easy for the local communities to violate the law willy-nilly because traditional authorities and their communities were either not aware of the

law, having been excluded from the formulation of the law in question,³² or because the law itself was the cause of jurisdictional conflict over land and forest estate. Thirdly, from the perspective of responsiveness, how does a regulatory system respond to complex socio-economic realities to which the law was never designed to respond in the first place? In addition, the FD as the sole GRZ regulator hasn't had both financial and technical capacity to undertake such highly skilled assessments as monitoring the communities' responsiveness to the law. This institutional incapacity has remained a fundamental issue to date. Essentially, the Forests Act 1973 became ineffective because of its unresponsiveness.

Ultimately, much of the ineffectiveness of the Forests Act 1973 and its dominant CAC regulation were attributed to a combination of regulatory factors; (i) reliance on inappropriate regulatory instruments leading to what is known as instrument failure,³³ (ii) lack of sufficient information about the problems being regulated leading to what is known as information failure,³⁴ (iii) poor enforcement on the part of the regulators leading to what is known as implementation failure,³⁵ and (iv) motivation failure – meaning, those being regulated are not motivated enough to comply with the rules.³⁶ Logic then posits that motivation failure is determined by the extents to which people view the coherence of the law to their societal needs. It then follows that motivation failure occurs when the targeted population sees no rationality in complying with the rules. Put together, these factors define regulatory failure in general but separated, they depict the major demerits of CAC in particular. Hence, the regulatory system attempted to respond in 1999 as follows:

27 Bertha Osei-Hweidie, 'Environmental Protection and Economic Development in Zambia' (1996) 11(2) *Journal of Social Development in Africa* 57, 58.

28 *ibid* 58.

29 Chungu (n 7) 10.

30 *ibid*.

31 *ibid*.

32 *ibid*.

33 Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' [2001] *Current Legal Problems* 103, 104-7.

34 *ibid* 105.

35 *ibid* 105-106.

36 *ibid* 106-107.

3

THE FORESTS ACT NO 7 OF 1999

The turning point in the management of forests in Zambia started with ideas laid down in the Zambia Forestry Action Plan (ZFAP) 1998 to 2018; a twenty year action plan meant to overhaul forest management in the country.³⁷ The ideas of the ZFAP were progressively developed into objectives of the Zambia National Forestry Policy of 1998 and subsequently coined into the object of the Forests Act No.7 of 1999.³⁸ Essentially, the Forests Act 1999 was a brain child of the ZFAP as well as conceived to be a national strategy for fulfilling international obligations under the UNCBD.³⁹ Therefore, other than national issues to which the Forests Act 1973 became inept, there was an array of growing international pressure to which natural resource law in Zambia needed to respond. Bertha Osei-Hweidie alluded to this as one of the influences that contributed to the development of national environmental law and policy in Zambia.⁴⁰

Maintaining a strong reliance on CAC regulation, the Forests Act 1999 was enacted to:

establish the Zambia Forestry Commission and define its functions; to provide for the establishment of National Forests, Local Forests and joint forest management areas; to provide for the participation of local communities, traditional institutions, non-governmental organizations and other stakeholders in sustainable forest management; to provide for the conservation and use of forests and trees for the sustainable management of forest ecosystems and biological diversity; to provide for the

implementation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the Convention on Biological Diversity and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa; to repeal the Forests Act, 1973; and to provide for matters connected with or incidental to the foregoing.⁴¹

From its preamble, the Act clearly sought to; firstly, deal with the debilitating institutional, technical and financial challenges of the FD by upgrading the FD into a semi-autonomous Forestry Commission. The inherent idea in this provision was informed by the fact that forestry problems in the country could not be addressed without first strengthening the position, capacity and autonomy of the regulatory authority.⁴² Factors compounding forest loss and degradation from the 1970s to 1999 presented more than enough evidence to justify this approach.

Secondly, to broaden the legal scope of forest management from the narrow coverage of ‘demarcated forests’ in the Act of 1973 to a broader coverage which would include the establishment of Joint Forest Management (JFM) areas, participation of local communities, traditional institutions, non-governmental organizations and the involvement of other stakeholders in Sustainable Forest Management (SFM). While maintaining a hegemony on the Command side (through statutory rules), drafters of this law were indirectly leading the GRZ to loosen up on the Control side (regulatory aspects) of the CAC approach. Forest management in the Act of 1999 would also cover such ecologically sensitive areas as Protected Flora,⁴³ and forests in local communities.⁴⁴

³⁷ Matakala (n 18) i.

³⁸ *ibid* 1.

³⁹ *ibid* 1.

⁴⁰ Osei-Hweidie (n 27) 58.

⁴¹ The Forests Act No.7 of 1999, preamble.

⁴² Matakala (n 18) 7-8.

⁴³ The Forests Act 1999, Part VII.

⁴⁴ *ibid* s 2.

This automatically translated into an expanded scope of forest management for the semi-autonomous Forestry Commission.

Thirdly, it provided for the conservation and use of forests and trees for the sustainable management of ecosystems and biological diversity. This was built on an implicit recognition of forests and their value not just in terms of instrumental utility as sources of timber but as natural habitats for a wide range of biodiversity and for maintaining healthy ecosystems. For the first time in Zambia's forestry law, the concept of sustainable development was introduced.

Fourthly, the law was also meant to be a national mechanism for fulfilling international obligations of environmental law and domesticate internationally recognized principles of environmental law such as public participation and sustainable development through the implementation of the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the CBD and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. This signified an integrated approach to forests and environmental management owing to the interconnected and multi-faceted nature of forests and environmental issues like loss of biodiversity. As such, the Act was attempting to raise the profile of environmental management in general and forest protection in particular to an international level.

Fifth, the law was to demonstrate regulatory responsiveness following the ineffectiveness, irresponsiveness and incoherence of the Forests Act 1973. Hence, the need to repeal the former. But above all, the Forests Act 1999 sought to address two broad categories of problems; (i) the institutional and administrative challenges of the regulator, the FD in particular, and in the forestry sector in general, and (ii) the escalation of forest degradation and deforestation trends in the country.

As legal drafting custom dictates in Zambia, the Forests Act 1999 was to provide for matters incidental to or connected with the foregoing. The importance of the phrase 'matters incidental to and/or connected with the foregoing' cannot be underplayed in regulatory ethos. It points to the regulatory space that needs to

be occupied by different administrative procedures, regulatory mechanisms and enforcement techniques that need to be undertaken pragmatically in order to fulfil the object of the law. In essence, what needs to be practically done to implement the theoretical aspirations of the law so the law does not remain a white elephant on paper? This is the meaning of regulation from an empirical perspective.⁴⁵ The administrative procedures, the regulatory techniques and approaches used to reach the targeted population all constitute the regulatory infrastructure that the law establishes. All this must fit into 'matters incidental to or connected with' the spirit and the letter of the law.

The Act was conceived as a brain child of the ZFAP 1998-2018 and formed in the womb of the 1998 National Forestry Policy.⁴⁶ This demonstrates the Zambian approach of elaborating the values and norms of the state through policy and use legislation to enforce and protect the values. But the law never came into force. Why, then, even discuss a law that never came into force? That the roots of the Forests Act 2015 are founded in the Forests Act 1999, it would be incomplete to discuss the evolution of forest law and regulation in Zambia without reference to the defunct Forest Act 1999. Discussing it therefore, serves to highlight the thinking of the policy and law-makers of the time, to signify the problems the law sort to address at the time, and to explicate the future the law espoused. But inadequate flow of financial resources to the FD was very symptomatic of all the problems that culminated into failure to enforce the Act. This factor partly explained the technical and capacity debilitation in the department.⁴⁷ There was a sheer lack of multi-sectoral coordination for the implementation of forestry programs outlined in the ZFAP,⁴⁸ and the political inertia towards the idea of overhauling the sector was simply insurmountable according to a renowned Forestry expert in Zambia, Prof. Patrick Matakala.⁴⁹

45 Genn and others (n 4) iii.

46 Matakala (n 18) 4.

47 *ibid* 4.

48 *ibid* 4.

49 *ibid* 8.

Failure to enforce the Forests Act 1999 created a legal conundrum from 1999 to 2015. The country was forced to fall back on the repealed Act of 1973 to regulate the forestry sector whose problems had doubled since the 1980s. This was problematic in two ways: Firstly, the trends of forest degradation and deforestation in the country had tremendously increased, and secondly, the institutional, administrative and technical capacity challenges in the FD worsened. The Forests Act of 1973 was never designed to address any problem of this sort. How, then, could it be relied upon to regulate the troubled forestry sector beyond 1999? It is during this time that Zambia began to make global headlines for recording one of the highest deforestation rates in the world. The reason was primarily because the entire forest estate in the country became a de facto unregulated open access area.⁵⁰

Failure to implement the 1999 Act impeded the much needed flow of financial resources to the sector as donors and major forestry funders lost confidence in the whole system. A case in point; on 26th of January 2006, the Finnish Embassy announced a decision of the Finnish government to withhold funding meant to operationalize the Forestry Commission until the GRZ ironed out issues of the law.⁵¹ Implicit in the rationale of the Finnish Government was the observation that the ineffectiveness, irresponsiveness and the incoherence of the law was underpinning forest loss and degradation in the country. The Finnish Government's withdrawal of funding further compounded the FD's institutional and technical debilitation from which the department still grapples to recover to this day. Professor Patrick Matakala observes, in particular, that the failure to operationalize the semi-autonomous Forestry Commission as proposed in the Forests Act 1999 left the department with a demotivated cadre of staff (most of whom left) and shunned by the sector's traditional funders.⁵²

4

THE FORESTS ACT NO 4 OF 2015

In general, the Forests Act 2015 is an off-shoot of the defunct Forests Act 1999. With a change of government in 2011, new energy was generated to reinvigorate the legal and policy reforms in the forestry sector. The Forests Act of 1999 was revised and sent back to Parliament as Forestry Bill of 2012. For three years, the Bill was politically contested mainly because of the financial implications the semi-autonomy Forest Commission would bring to the fore.⁵³ To a large extent, however, the Act of 1999 was left intact other than the deletion of provisions establishing the semi-autonomous Forestry Commission. Ironically, the functions stipulated for the Forest Commission were also left intact while the Forest Commission itself was deleted. This meant that the FD was to take over the statutory functions of the Forestry Commission. Ultimately, all contested issues emanating from the Forests Act 1999 narrowed down to a latent desire for maintaining the hegemony of CAC in what was eventually enacted as the Forests Act 2015.

4.1 The Spirit of the Law

An Act to provide for the establishment and declaration of National Forests, Local Forests, Joint Forest Management (JFM) areas, botanical reserves, private forests and community forests; provide for the participation of local communities, local authorities, traditional institutions, non-governmental organizations and other stakeholders in SFM; provide for the conservation and use of forests and

⁵⁰ *ibid* 31.

⁵¹ Lusaka Times, 'Finland Withholds Forestry Commission Funds Because Of Bad Laws' *Lusaka Times* (26 January 2006) <<http://www.lusakatimes.com/2009/01/26/finland-withholds-forestry-commission-funds-because-of-bad-law/>>.

⁵² Matakala (n 18) 20.

⁵³ *ibid* 14-15.

trees for the sustainable management of forest ecosystems and biological diversity; establish the Forest Development Fund; provide for the implementation of the UNFCCC, CITES, the Convention on Wetlands of International Importance, especially as Water Fowl Habitat, the UNCBD in those Countries experiencing Serious Drought and/or Desertification, particularly in Africa and any other relevant international agreement to which Zambia is a party; repeal and replace the Forests Act 1999; and provide for matters connected with, or incidental to, the foregoing.

Of particular significance to the expanded scope of forest management are two new entrants into the system;

Firstly, the introduction of private forests is an open door for the participation of the private sector in forestry. While this door was only slightly open in the Act of 1999 through the recognition of rights, title and interests over land and trees, the business side of it was disincentivized through the extension of CAC regulation to felling, cutting and selling of forest produce derived from private ownership using licenses.⁵⁴ In the Forests Act of 2015, the door for private forestry is completely open from production to trading. Forest produce from a registered private forest may be exempted from felling, cutting and selling licenses.⁵⁵ But why 'may it be' rather than 'shall it be' exempted? This discretionary legal language depicts the lingering effects of CAC regulation on forestry in general. In particular, it shows the stretch of the government arm on controlling forestry business even on private land. In addition, the opportunity for deregulation of private forestry is significantly widened

in the principle of Presidential stewardship. Section three excludes private forests from all the other demarcated forests whose ownership of trees and forest produce vests in the President. Ownership of a tree and all forest produce derived from a registered private forest is vested in the owner. This should be the right that protects the owner when felling, cutting and/or selling forest produce their private forest.

Secondly, the introduction of Community Forest Management (CFM) is informed by a recognition of how important local communities are both to the degradation and sustainable management of forests. Designers of this Act, particularly of the Act of 1999, were cognizant of the fact that lessons of neglecting local communities out of forest management in 1973 were too huge to be repeated. Equally important is the fact that the conflict of jurisdiction over land and forests between the FD and traditional Chiefs was so daunting that it needed a legally supported solution.⁵⁶ A specific Statutory Instrument (S.I) regulating CFM was issued in 2018 and basically established three things; (i) rights and obligations of the communities to engage in CFM, (ii) the procedural mechanism for the communities to embark on in seeking these rights, and (iii) the community institutional framework required for engaging in CFM. With the rights granted under the S.I, communities receive the power and duty to manage demarcated forests in their communal localities,⁵⁷ and acquired the authority to restrict access to those forests.⁵⁸

A Community Forest Management Group (CFMG) is required to be established and recognized for this purpose, then designated as a community legal entity in the chain of power from the Director of Forestry to the local community.⁵⁹ The CFMG is also required to assist the Director of Forestry to control restricted activities within an established community forest area.⁶⁰ But why must the community, through the

⁵⁴ The Forests Act 1999, s 38 (2).

⁵⁵ The Forests Act 2015, s 27 (3).

⁵⁶ Government of the Republic of Zambia, Report of the Auditor General on Sustainable Forest Management 2012-2015, vi.

⁵⁷ The Forests (Community Forest Management Regulations) S.I No. 11 of 2018, regulation 5.

⁵⁸ *ibid* regulation 9 (3) a.

⁵⁹ *ibid* regulation 5.

⁶⁰ *ibid* regulation 16 (1).

CFMG, help the Director of Forestry rather than the Director help the community? This exposes the latent regulatory culture that runs through the genetics or the spirit of the law and regulation while the letter of the law is ostensibly inclined towards deregulation. Essentially, the CFM regulations are simply giving the communities the right to undertake forest management for, and on, behalf of the Director of Forestry. The Presidential stewardship principle is hereby delegated to the Director of Forestry which merely devolves the very essence of CAC regulation. This also explains the huge amount of power and duty the Director possesses in granting and/or revoking community rights throughout the regulations.

Providing for the participation of local communities, local authorities, traditional institutions, non-governmental organizations and other stakeholders in SFM brings three lessons to the fore:

Firstly, that the complexity of forest degradation and deforestation in the country depicts national socioeconomic development challenges of the many poor and jobless Zambians.⁶¹ This means that no single national institution or regulatory body, by itself or on its own, can claim to be adequately positioned to manage drivers of deforestation in the forestry sector. Behind this provision, policy and law-makers do concede the fact that the FD is too inadequate to manage the entire forest estate in the country. Each of the institutions, organizations, authorities and stakeholders the law seeks to bring into forest management have a specific influence on the drivers of deforestation in the country either positively or negatively, directly or indirectly, just as they have a specific role to play in national development.

Secondly, and from a regulatory ethos, the multi-stakeholder approach in the Forests Act 2015 is a cardinal part of deregulation - otherwise referred to as 'regulation in many rooms'.⁶² This is justified by the

complexity of socioeconomic challenges that development in Zambia brings to the fore. Complexity here refers to four particular scenarios of regulatory failure as outlined by Julia Black; (i) the complex nature of the interactions between state actors and the socioeconomic needs of the targeted populations,⁶³ (ii) the asymmetries of information in practical reality given that, either all of these socioeconomic complexities are unknown or may only be imperfectly understood as different motivations ostensibly drive people into the forests,⁶⁴ (iii) the fragmentation of knowledge between state regulators and the targeted populations raises doubts as to how much the regulators can claim to understand the huge forestry estate they are mandated to regulate on their own? Case in point; it is reported that the FD rarely gets accurate and correct information about the harvesting practices of the licensed concessionaries in the forests due to lack of field staff on the ground;⁶⁵ and (iv) fragmentation in the exercise of power and control is a challenge on its own.⁶⁶ In a multi-party democracy characterized by regional voting patterns across different ethnic groupings, the GRZ cannot claim to have a monopoly on the exercise of regulatory power and social control everywhere in the country. Consequently, the motivation for people to comply with government CAC regulation is low and ultimately leads to motivation failure. It is this vacuum of motivational failure that other organizations, institutions, authorities and stakeholders should occupy in forest management.

Thirdly, while the Forests Act 1973 narrowly used 'law' as the sole font of regulation, the multi-stakeholder approach in the Forests Act 2015 broadens the view of regulation beyond law. This illustrates the technical conception of the term 'regulation' which means; the use of a diversity of mechanisms, including rules, to influence and control the flow of activities on the ground.⁶⁷ As such, the multi-stakeholder approach is a direct result of the failures of CAC regulation whose

⁶¹ Interview with Mr. Lishomwa Mulongwe, Chief Forestry Research Officer in the Forestry Department, Kitwe (Zambia, 7 August 2019).

⁶² Black (n 33) 103-4.

⁶³ *ibid* 107.

⁶⁴ *ibid* 107.

⁶⁵ Government of the Republic of Zambia (n 56) v.

⁶⁶ Black (n 33) 107.

⁶⁷ Bell and others (n 6) 229.

common caricature manifests in poorly targeted rules, rigidity and ossification, under or over-enforcement, all of which ultimately lead to unintended consequences.⁶⁸ Given its inherent rigidity, CAC regulation is often unresponsive which makes it blunt in the face of emerging issues unforeseen by the drafters. To avert this danger, the GRZ has loosened its grip on the control aspect (through multi-stakeholder approach) while maintaining a tight grip on the command aspect (use of statutory rules) of CAC regulation. Therefore, the Forests Act 2015 was well designed to be responsive to the escalating forest loss and to be coherent to the socioeconomic needs of the Zambian people at the same time. But has the responsiveness and coherence of the law translated into effectiveness?

Given the overpowering nature of CAC, the effectiveness of the Forests Act largely depends on its enforcement by the regulator, the FD, which is in dire need of financial resources to undertake all its statutory functions. The law provides for the establishment of the Forest Development Fund as one of the mechanisms to address lack of sustained financial flows from the government and cooperating partners into the department. Much of the department's technical, resource and administrative incapacities are attributable to this factor. Ironically, there is a lot of money generated from forests in Zambia especially through timber harvests and non-timber forest produce like honey, devil's claw, caterpillars and charcoal production and trade.⁶⁹ This is what counts towards the 5.2 per cent contribution of forestry in general to the country's GDP.⁷⁰ But many of these forestry activities are illegal and not monitored because the FD

fails to capture them, to account for the financial flows deriving from such activities and to evaluate their impact on both the economy and forest resources. This narrows down to the inadequate capacity of the FD.

The Forests Act 1999 attempted to address this matter by first, transforming the FD into a Commission and secondly, by giving the Commission significant amount of autonomy to run its own affairs, plan, manage, and decide its own financial matters including revenue collection. Contrary, the thinking of the Forests Act 2015 is reflected in the idea that the department can and should solve much of its financial problems through the Forest Development Fund. Principally, monies into this fund should come from voluntary contributions by any well-wishers,⁷¹ grants from any source within and without the country as the Minister may approve,⁷² and from interest arising out of any investment of the fund.⁷³

Imperative, however, is whether, in its current state, the department is able to command enough confidence and trust from within and without the country to attract this money through the outlined sources? The Auditor General's report on SFM from 2012 to 2015 gives a glimpse into this matter. The report concludes, *inter alia*, 'there is inadequate investments in forest plantations due to lack of funding and delayed funding as a result, important activities such as planting and weeding were done at the wrong time or not done at all'.⁷⁴ Reference to forest plantations in this report is crucial because it is one of the major prescribed uses of the money in the Forest Development Fund.⁷⁵ But currently, the department is still grappling with

68 Black (n 33) 105.

69 The author draws authority for this assertion from his experiences as Zambia National Farmers' Union (ZNFU) Manager for Environment and Forestry, his current positions as UNFAO National Consultant in Community-based Forest Enterprises and from his Research works at the Center for Environmental Research and Education (CERED).

70 Government of the Republic of Zambia, National Forestry Policy of 2014, 6.

71 The Forests Act 2015, s 70 (2) b.

72 *ibid* s 70 (2) c.

73 *ibid*, s 70 (2) d.

74 Government of the Republic Zambia (n 56) v.

75 Forests Act 2015, s 70 (3).

poor financial resources because its traditional funders and cooperating partners lost confidence in the sector following the failed implementation of the Forests Act 1999,⁷⁶ the piece of legislation which was designed to address the institutional and administrative challenges of the department. The failure to enforce the Forests Act 1999 means the FD in the Forests Act 2015 continues to grapple with its statutory functions.

4.2 Function of the Forestry Department and its Director

Given the strength of CAC used throughout all the three forest legislations from 1973 to 2015, the success of controlling forest degradation and combating deforestation in Zambia depends more on the ability of the FD (the control) to undertake its statutory functions prescribed in section five than on legal text on paper (the command). It is not surprising that the functions of the FD in section five are a 'copy-and-paste' of the functions of the Forestry Commission promulgated in the Act of 1999 as the one is birthed out of the other. The department also has some additional mandates in the Act of 2015 which were not explicit in the 1999 Act. The institutional, administrative and framework of the Commission in the Act of 1999 was to be larger and more autonomous than a department operating under a Permanent Secretary in a Ministry. But the very functions which the Commission should have undertaken under a semi-autonomous structure have been lumped on a department that runs on limited financial resources and technical capacity with limited autonomy in the Act of 2015. How does the incapacitated FD manage to double its scope of work under the new mandate when it has always been challenged to undertake a narrower scope of work even before Act of 1999?

Further, the role of the Director of Forestry does not reflect feasible reality. In practice, the Director of Forestry must operate under the supervision of the Permanent Secretary in the Ministry as required and guided by the operational rules of the ministry. This is part of the bottlenecks which the Forests Act of 1999 sort to bypass through its proposed institutional reforms from a department to a Forestry Commission. In theory however, the Forests Act of 2015 elevates the Director not only as head of the Forestry Department but mandates him/her with huge responsibility, duty and power to administer the Act in its entirety.⁷⁷ This magnitude of authority is only comparable to that of a Director General of any other statutory body in Zambia. In undertaking this duty, the Director of Forestry does not have any other legal entity or persons (like the Permanent Secretary) in between him/her and the Minister within the chain of legal mandate and power. It is discernable that the ideal functions of the Director of Forestry were those functions initially intended for the Director General of the Forestry Commission in the repealed Act 1999. Ultimately, the underwhelming functionality of the FD as well as the practical reality of the institutional framework within which the Director of Forestry operates on a daily basis have a huge bearing on the enforcement of the law.

4.3 Enforcement Gaps

Though undertaken just before the enactment of the Forests Act of 2015, the Auditor General's report of SFM highlights a set of six problems in the sector.⁷⁸ Only one of the six problems has been addressed through the CFM Regulations of 2018. Meanwhile, all the six problems highlighted in the report have remained significant enforcement issues even after the enactment of the Forests Act of 2015. The whole

76 Matakala (n 18) 26.

77 The Forests Act 2015, s 4 (2).

78 Government of the Republic of Zambia (n 56) v-vi.

section, five prescribing the functions of the FD, suffers huge enforcement gaps as long as the department and its crippling challenges remain unresolved. The department's mandate has been expanded without correspondingly expanding its institutional, financial, technical and human resource capacity. Allegorically, this is like a disabled person who fails to carry a 10kg bag because of his disability. But he is given an additional 25kg bag to lift without first treating the disability.

The failure to control, manage, conserve and administer National and Local Forests and botanical reserves as stipulated in paragraph b of subsection two, section five, in particular, is fundamental in explaining the current state of forest loss in Zambia. Lack of Honorary forest officers as prescribed in section six compounds the inadequacy of staffing in the FD. But it boils down to the fact that there is no money to pay them. Without this cadre of field staff, the vast forest estate in the whole country remains a de facto open access area.⁷⁹ Forest certification is still a challenge in promoting SFM because the FD cannot yet enforce provisions of section nine, particularly, paragraph c of subsection one. Forest certification comes with prior processes that need to be in place beforehand; there must be a certification criteria upon which the definition of sustainability shall be based,⁸⁰ and a set of sustainability indicators and standards for certification.⁸¹ These processes cannot happen in a vacuum but through participatory stakeholder engagement processes that require money. The FD is not in any financial position to drive such processes.

Failure to enforce section twenty-five pertaining to the prohibition of certain activities in botanical reserves explains the encroachments and indiscriminate cutting, felling and excavations, fires and openings which the paragraphs of subsection one are trying to control. This is coupled with the failure to enforce part VI (Regulation of Forest Produce) in general and section forty nine in particular. An important part of regulating

forest produce is timber marking prescribed in Part VII. There is a lot unmarked, thus illegal, timber felled and conveyed from protected forests on our roads day and night as the FD cannot be found everywhere all the time.⁸²

Part IX details the regulatory actions that a forestry officer is mandated to undertake for the purpose of the Act. While in theory, the law hereby gives authorized officers power to enforce the law, there is a huge shortage of such officers on the ground in reality. Section seventy four, subsection one and paragraph c for instance, enacts that an authorized forest officer may require any person found in the forest area who has in that person's possession forest produce to give an account of the manner in which the person came in possession of the forest produce... This provision explicitly requires forest officers to take physical patrols of the vast forest estates in the country. But the reality is that the said forest officers are, firstly, very few and secondly, have no transport to patrol the massive forest areas under their jurisdictions.

Essentially, all the enforcement actions prescribed under Part IX are hands-on in nature. They require transport for the forest officers to be physically on the ground. But because of the dominant CAC regulatory infrastructure around which the Act is built, it becomes impractical to enforce the law (the command) when the state regulatory body (the control) is itself incapacitated to carry out its functions. In the final analysis, the Act has an inbuilt ability to be responsive to the escalating forest loss as well as being coherent to the multiple socioeconomic needs of the many poor and jobless Zambians. The design of its rules, the extent to which it provides for indirect regulation and the recognition of stakeholders' rights signify its coherence. The Act is also designed with an inbuilt ability to be responsive to, especially, the growing socioeconomic needs of the Zambian society and unforeseen emerging issues. The discretionary room in the section

⁷⁹ Matakala (n 62) 31.

⁸⁰ The Forests Act 2015, s 9(1) a.

⁸¹ *ibid* s 9(1) b.

⁸² Government of the Republic of Zambia (n 56) v.

five functions of the FD are deregulatory in nature allowing for a wide scope of responsiveness to different issues of the past, present and of the future to promote sustainable forest management. Therefore, the Act of 2015 is, in theory, coherent and its ability for responsiveness is discernable. In practice however, the Act can hardly be effective given the incapacities of its main implementing agency - the FD. In sum, the debilitating capacity of the FD makes the whole law ineffective because there is still a huge gap between what the law says in theory (legal text) and what transpires in real life (social context).

5 CONCLUSION

The Forests Act 1973 was the first post-independence national legislation to regulate forestry in Zambia. Other than to simply assert national sovereignty and authority over the forest estate, the Act was not conceived as an instrument for solving any set of forestry-related problems in the present or in the future. The Government of the First Republic of Zambia simply used the Act as legislative instrument to assert its national value on the forest estate, a value which was then expressed through a post-independence culture of Command and Control. As such, the legislation failed to be responsive to the emerging problems of the 1980s. It was also deemed incoherent to the growing socioeconomic needs of the many poor and jobless Zambians particularly because it was not designed for such. The Act failed to respond to three broad set of problems; (i) the escalating forest loss through deforestation and forest loss, (ii) the increasing poor capacity of the Forests Department and (iii) the jurisdictional conflict over land and forests between the FD and traditional chiefs under customary land.

The Forests Act 1999 was seen as a very progressive legislation that would overhaul forest management in Zambia by responding to the three forgoing problems. The need to respond to the aforementioned forestry problems and the desire to make the regulatory system coherent to the many

Zambians were too huge to be ignored. Therefore, key elements of the Act were the alterations of the command (rules) and a reduction in the extents of the control (regulatory approach) aspects of the Command-and-Control regulation from the 1973 legislation. Establishment of a semi-autonomous Forest Commission was the 'elephant in the room' where the deregulatory control aspects were concerned. But the financial implications which the idea of a semi-autonomous Forest Commission brought to the fore veiled was used as an astute defense of the hegemony on traditional values. Generally, the foundational spirit of the Forests Act 1999 were an implicit challenge to the dominant culture of command-and-control. Consequently, the Act never came into force but was later edited and resuscitated into a different statute in order to restore the fundamental state culture on the one hand, but exhibiting some elements of changing values on the other hand. The resuscitated form of the Act of 1999 became the Forests Act 2015.

By repealing the Act of 1999, the Forests Act of 2015 would have logically been expected to continue addressing the three, broad set of problems which the former sought to address. If the department was already technically challenged in terms of capacity to undertake the scope of the 1999 Act, what guarantee is there that the department will manage to undertake an expanded scope of work in the Forests Act 2015 while carrying forward the department's old institutional, administrative, technical, financial and capacity challenges? The Forests Act 2015 not only repeals the Act of 1999, it provides for the continuation of the technical staff and administrative machinery of the FD.⁸³ Inevitably, all the capacity challenges of the department are thereby carried forward in an effort to maintain a hegemony of the foundational culture of Command-and-Control.

In summary, government's underpinning idea for natural resource management in Zambia has always been defined by a need to assert authority and

⁸³ The Forests Act 2015, s 107.

sovereignty over land and everything that stands on the land. Government's value of forestry derives from this idea, and it is also seen in the way the sector has been managed through a culture of commanding and controlling the sector from 1973 to 2015. Statutory law is nothing but an instrument through which the GRZ projects its culture of protecting and enforcing its overt and/or covert values. This paper was not set to argue whether this culture is good or bad, or whether it is appropriate or not. The paper was set to analyze the blind spot of a culture of Command and Control. It is in this cultural blind spot that regulatory gaps occur particularly because; in its attempts to preserve a hegemony on its traditional values, the regulatory culture fails to discern the dynamics of changing times. In the process, the regulatory machinery becomes irresponsible to the very mischief it was meant to cure, incoherent to the values of the same society which drives deforestation and forest degradation. Empirically speaking, the legal/regulatory machinery is rendered ineffective in practice.

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